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Second report on responsibility of international organizations

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I. Introduction*

1. The International Law Commission adopted in 2003 the first three draft articles on the topic "Responsibility of international organizations".[1] Several comments were made on those articles in the Sixth Committee of the General Assembly during the examination of the Commission's report.[2] The wording of the definition of international organizations in draft article 2 was the main object of that exchange of views. In my opinion, all those comments should be considered by the Commission before the end of the first reading. The Commission may then decide whether to revise the draft articles as they were provisionally adopted or to postpone their revision to the second reading.

2. On the basis of a recommendation made by the Commission during its 2002 session,[3] the Legal Counsel of the United Nations requested a number of international organizations to provide comments and materials "especially on questions of attribution [of conduct to international organizations] and of responsibility of member States for conduct that is attributed to an international organization". With a few noteworthy exceptions, the replies hereto given by international organizations have added little to already published materials. It is the Special Rapporteur's hope that the continuing discussion in the Commission will prompt international organizations to send further contributions, so that the Commission's study may more adequately relate to practice and thus become more useful.

3. In that context it is to be noted that the General Assembly, in its resolution 58/77 of 9 December 2003, requested:

> "[...] the Secretary-General to invite States and international organizations to submit information concerning their practice relevant to the topic 'Responsibility of international organizations', including cases in which States members of an international organization may be regarded as responsible for acts of the organization."[4]

4. Under the heading "General principles" draft article 3 stated:

> "2. There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

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[1] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), chap. IV, sect. C, para. 53.

[2] Especially in the meetings held between 27 October and 4 November 2003 (A/C.6/58/SR.14-21). Only comments that relate to questions of attribution of conduct will be analysed in the present report.

[3] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* and corrigendum (A/57/10 and Corr.1), chap. VIII, paras. 464 and 488. The following quotation comes from the latter paragraph.

[4] Paragraph 5 of General Assembly resolution 58/77.

(a) Is attributable to the international organization under international law [...]".[5]

The present report will discuss issues relating to attribution of conduct to international organizations.

II. Relations between attribution of conduct to an international organization and attribution of conduct to a State

5. The articles adopted by the Commission on responsibility of States for internationally wrongful acts contain a number of provisions on attribution of conduct (articles 4 to 11).[6] While these articles are not immediately relevant to international organizations, they have to be fully taken into account when discussing issues relating to attribution to international organizations that are parallel to those concerning States. The need for coherency in the Commission's work requires that a change, in respect of international organizations, in the approach and even the wording of what has been said with regard to States needs to find justification in differences concerning the relevant practice or objective distinctions in nature.

6. Should one assume that conduct could not be simultaneously attributed to a State and an international organization, the positive criteria for attributing conduct to a State would imply corresponding negative criteria with regard to attribution of the same conduct to an international organization. In many cases the question will in practice be whether a certain conduct should be attributed to one or, alternatively, to another subject of international law. However, conduct does not necessarily have to be attributed exclusively to one subject only. Thus, for instance, two States may establish a joint organ, whose conduct will generally have to be attributed to both States. Similarly, one could envisage cases in which conduct should be simultaneously attributed to an international organization and one or more of its members.

7. A paradigmatic example is offered by the bombing in 1999 of the territory of the Federal Republic of Yugoslavia. That military action gave rise to much discussion on the point whether conduct had to be attributed to an international organization or to some or all of its members. In relation to the bombing, several members of the North Atlantic Treaty Organization (NATO) were sued before the International Court of Justice in the cases on *Legality of use of force*[7] and before the European Court of Human Rights in *Bankovic*.[8] In both venues some of the respondent States argued that conduct was to be attributed to NATO and not to

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[5] See footnote 1 above.

[6] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), chap. IV, sect. E.1, para. 76.

[7] While by two orders of 2 June 1999 the International Court of Justice removed two cases from the Court's list, the other eight cases are still pending. The Court is due to examine shortly the objections to its jurisdiction raised by the defendant States.

[8] This application was declared inadmissible by the Grand Chamber of the European Court of Human Rights by a decision of 12 December 2001. The English text of the decision was reproduced in *Rivista di diritto internazionale*, vol. 85 (2002), p. 193.

themselves, as the claimants contended.[9] While a discussion of this question would not be appropriate here, one may argue that attribution of conduct to an international organization does not necessarily exclude attribution of the same conduct to a State, nor does, vice versa, attribution to a State rule out attribution to an international organization.[10] Thus, one envisageable solution would be for the relevant conduct to be attributed both to NATO and to one or more of its member States, for instance because those States contributed to planning the military action or to carrying it out.[11]

8. Dual attribution of conduct normally leads to joint, or joint and several, responsibility. However, joint, or joint and several, responsibility does not necessarily depend on dual attribution. One can take as an example the so-called mixed agreements, to which both the European Community (EC) and its member

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[9] Reference may be made, for instance, to the oral pleading of the Agent for the Government of Canada, Mr. Kirsch, on 12 May 1999 (CR 99/27; the relevant passage was reproduced by R. Higgins, "The Responsibility of States members for the Defaults of International Organizations: Continuing the Dialogue", in S. Schlemmer-Schulte and K.-Y. Tunk (eds.), *Liber Amicorum Ibrahim F.I. Shihata* (The Hague/London/Boston/New York: Kluwer Law International, 2001), p. 441 at p. 447) and to the memorial of the French Government in the Bankovic case (see the passage quoted by P. Weckel, "Chronique de jurisprudence internationale", *Revue générale de Droit international public*, vol. 106 (2002), p. 423 at p. 446, with a critical comment). The view that conduct of NATO forces could be attributed only to NATO was held by A. Pellet, "L'imputabilité d'éventuels actes illicites. Responsabilité de l'OTAN ou des Etats membres", in C. Tomuschat (ed.), *Kosovo and the International Community. A Legal Assessment* (The Hague/London/New York: Kluwer Law International, 2002), p. 193 at p. 199. T. Stein, "Kosovo and the International Community. The Attribution of Possible Internationally Wrongful Acts: Responsibility of NATO or of its Member States", ibid., p. 181 at pp. 189-190 accepted attribution of conduct of NATO forces to NATO, but excluded NATO's responsibility because it was "as such not recognized by the possible claimant (Yugoslavia)". J. Verhoeven, *Droit international public* (Bruxelles: Larcier, 2000), p. 613 denied NATO's legal personality. G. Cohen-Jonathan, "Cour européenne des droits de l'homme et droit international général (2000)", *Annuaire français de Droit international*, vol. 46 (2000), p. 611 at p. 632 stressed the autonomy of NATO member States when they act within the NATO system.

[10] This point had already been made, albeit with reference to damage ("dommage"), by J.-P. Ritter, "La protection diplomatique à l'égard d'une organisation internationale", *Annuaire français de Droit international*, vol. 8 (1962), p. 427 at pp. 444-445. The Committee on Accountability of International Organizations of the International Law Association suggested to state that "[t]he responsibility of an IO does not preclude any separate or concurrent responsibility of a State or of another IO which participated in the performance of the wrongful act [...]". International Law Association, *Report of the Seventieth Conference held in New Delhi 2-6 April 2002* (2002), p. 797.

[11] As was said by the Netherlands Minister of Foreign Affairs with regard to the military operations in question:

> "[...] the Netherlands was fully involved in the decision-making process regarding all aspects of the aerial operation, the formulation of the political objectives of the aerial campaign, the establishment of the operational plan on which the campaign was based, the decision concerning the beginning and the end of the operation and the decision concerning the beginning of the various stages."

Declaration made on 18 May 2000 in a debate in the Lower House, reproduced in *Netherlands Yearbook of International Law*, vol. 32 (2001), p. 192 at p. 196. Most member States were involved also in the implementation of decisions. It is noteworthy in this context that the claim of the Government of China in relation to the bombing of China's embassy in Belgrade on 7 May 1999 was settled through a bilateral agreement between China and the United States. *U.S. State Department Digest of United States Practice in International Law for calendar year 2000*, http://www.state.gov.

States are parties. In case of an infringement of a mixed agreement that does not distinguish between the respective obligations of the EC and its member States — either directly, or by referring to their respective competencies — responsibility would be joint towards the non-member State party to the agreement. As the European Court of Justice said in Case C-316/91, *Parliament v. Council*, with regard to the Fourth Lomé Convention:

> "[...] in the absence of derogations expressly laid down by the Convention, the Community and its member States as partners of the ACP States [States of Africa, the Caribbean and the Pacific] are jointly liable to those latter States for the fulfilment of every obligation from the commitments undertaken [...]"[12]

In this case attribution of conduct to the EC or a member State does not appear to be relevant when deciding who is responsible. Even if it was ascertained that conduct was attributable only to one of the actors, they would all be jointly responsible.

9. The type of situation examined in the preceding paragraph is not the only one in which responsibility could arise for an international organization for conduct taken by another subject of international law, for instance a State. This may occur under circumstances similar to those considered in chapter IV of part one of the articles on responsibility of States for internationally wrongful acts.[13] In that chapter, articles 16 to 18 refer to cases in which a State is responsible because it "aids or assists" or "directs and controls another State in the commission of an internationally wrongful act", or else "coerces another State to commit an act [that] would, but for the coercion, be an internationally wrongful act of the coerced State". It seems reasonable to envisage that, if an international organization aids or assists, or directs or controls, a State in the commission of a wrongful act, or coerces a State to commit it, the organization should be held responsible under conditions similar to those applying with regard to States. These cases will have to be examined in a chapter corresponding to chapter IV of part one of the articles on responsibility of States.

10. What is more relevant in the discussion of questions of attribution is a different case, which was not mentioned in the articles on responsibility of States and in the respective commentary, possibly because it was held to be marginal. This case deserves consideration with regard to international organizations because of its greater practical importance in that context. Let us assume that certain powers have been transferred to an international organization, which may then conclude an agreement with a non-member State with regard to the use of those powers. As an example one could take the case of an agreement concluded by the EC in an area in which the EC is exclusively competent, such as common commercial policy. Should the implementation of a trade agreement that was concluded by the EC be left, at least in part, to State organs, for instance, customs officials, who are not placed under the organization's control, the organization would have to be responsible in case of an infringement of its obligations under the agreement, but would it be so for its own conduct?

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[12] Judgment of 2 March 1994, *European Court Reports* (1994), p. I-625 at pp. I-661-662 (recital 29).

[13] See footnote 6 above.

11. Considering this question, the Director-General of the Legal Service of the European Commission explained in the following way the attitude taken by the EC with regard to trade disputes that were brought by the United States before a WTO panel against two EC member States:

> "[given] the 'vertical' structure of the EC system as it concerns the authorities of the Member States (customs administration) acting as implementing authorities of EC law in a field of exclusive Community competence [the] EC took the view that the actions of these authorities should be attributed to the EC itself and emphasised its readiness to assume responsibility for all measures within the particular field of tariff concessions, be they taken at EC level or at that of the Member States [...]"[14]

This approach implies that conduct that would have to be attributed to a State according to the articles on responsibility of States would be instead attributed to the international organization because of its exclusive competence. One cannot rule out that special developments may occur with regard to organizations providing for integration. However, there is no need to devise special rules on attribution in order to assert the organization's responsibility in this type of case. Responsibility of an organization does not necessarily have to rest on attribution of conduct to that organization.[15] It may well be that an organization undertakes an obligation in circumstances in which compliance depends on the conduct of its member States. Should member States fail to conduct themselves in the expected manner, the obligation would be infringed and the organization would be responsible. However, attribution of conduct need not be implied. Although generally the organization's responsibility depends on attribution of conduct, a point which is reflected in draft article 3 (see above, para. 4), this does not necessarily occur in all circumstances.

12. Annex IX to the United Nations Convention on the Law of the Sea provides an example of an approach which is focused on attribution of responsibility rather than on attribution of conduct. According to article 5, international organizations and their member States are required to declare their respective competence with regard to matters covered by the Convention. Article 6 states:

> "Parties which have competence under article 5 of this Annex shall have responsibility for failure to comply with obligations or for any other violation of this Convention."[16]

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[14] Information note dated 7 March 2003, attached to a letter from the Director-General of the Legal Service of the European Commission, Mr. Michel Petite, addressed to the United Nations Legal Counsel, Mr. Hans Corell, p. 2. This view reflects the opinion expressed by J. Groux and P. Manin, *The European Communities in the International Order* (Brussels: European Communities, 1985), p. 144.

[15] In the oral pleadings to the WTO panel on *European Communities — Customs Classification of Certain Computer Equipment*, the EC no doubt asserted that responsibility for infringements, if any, was entirely its own and not of the two member States involved. However, this view was not based, at least explicitly, on the argument that conduct of State customs authorities had to be attributed to the EC.

[16] United Nations, *Treaty Series*, vol. 1833, p. 397 at p. 580. J. Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (The Hague/London/New York: Kluwer Law International, 2001), p. 165, wrote: "Articles 5 and 6 of Annex IX essentially create a *procedural framework* within which doubts as to questions of attribution can be addressed". This should be understood as referring to attribution of responsibility, not of conduct.

No reference is here made to attribution of conduct. This is confirmed by practice. For instance, one cannot find a reference to attribution of conduct in the special agreement between Chile and the European Communities which established a special chamber of the International Tribunal for the Law of the Sea in order to ascertain inter alia:

> "whether the European Community has complied with its obligations under the Convention, especially articles 116 to 119 thereof, to ensure conservation of swordfish, in the fishing activities undertaken by vessels flying the flag of any of its member States in the high seas adjacent to Chile's exclusive economic zone."[17]

The alleged omissions include measures that would have had to be taken by the national States of the ships concerned.

13. The fact that a member State may be bound towards an international organization to conduct itself in a certain manner does not imply that under international law conduct should be attributed to the organization and not to the State. This point was clearly made by the European Commission of Human Rights in *M. & Co. v. Germany*, a case relating to enforcement by German authorities of a judgement given by the European Court of Justice against a German firm:

> "The Commission first recalls that it is in fact not competent *ratione personae* to examine proceedings before or decisions of organs of the European Communities [...] This does not mean, however, that by granting executory power to a judgement of the European Court of Justice the competent German authorities acted quasi as Community organs and are to that extent beyond the scope of control exercised by the conventional organs."[18]

Likewise, with regard to a claim for damage incurred because of the fruitless search for weapons of a ship in Djibouti, a memorandum of the Office of Legal Affairs of the United Nations stated:

> "The responsibility for carrying out embargoes imposed by the Security Council rests with Member States, which are accordingly responsible for

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[17] The text of the special agreement is reproduced in an order of 20 December 2000 of the International Tribunal for the Law of the Sea.

[18] Decision of 9 February 1990 on application No. 13258/87, *Decisions and Reports*, vol. 64, p. 138. It should be noted that, with regard to non-contractual liability of the EC, the Court of Justice of the European Communities did not express a different view on attribution in *Krohn v. Commission of the European Communities*, Case 175/84, *European Court Reports* (1986), p. 753 at p. 768, when it stated that "the unlawful conduct alleged by the applicant in order to establish its claim for compensation is to be attributed not to Bundesanstalt, which was bound to comply with the Commission's instructions, but to the Commission itself". While the EC was held liable, this was not because the German Bundesanstalt was considered an organ of the EC. The view that State authorities do not act as EC organs was recently reasserted by I. Scobbie, "International Organizations and International Relations" in R. J. Dupuy (ed.), *A Handbook of International Organizations*, 2nd ed. (Dordrecht/Boston/London: Nijhoff, 1998), p. 892, G. Cohen-Jonathan, op. cit. (see footnote 9 above), p. 623, and P. Weckel, op. cit. (see footnote 9 above), p. 447. The question was also discussed by P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Bruxelles: Bruylant/ Editions de l'Université de Bruxelles, 1998), pp. 385-386, and J. Klabbers, *An Introduction to International Institutional Law* (Cambridge: Cambridge University Press, 2002), pp. 307-308.

meeting the costs of any particular action they deem necessary for ensuring compliance with the embargo."[19]

While conduct of State authorities has to be attributed to the State in this set of circumstances, an organization's responsibility could be engaged for the reasons considered above.

III. The general rule on attribution of conduct to an international organization

14. According to article 4 on responsibility of States for internationally wrongful acts,[20] attribution of conduct to a State is basically premised on the characterization as "State organ" of the acting person or entity. Attribution could hardly depend on the use of a particular terminology in the internal law of the State concerned. Thus, what is decisive is not whether an entity is formally defined as an "organ". As the Commission observed in its commentary:

> "Where the law of a State characterizes an entity as an organ, no difficulty will arise. On the other hand, it is not sufficient to refer to internal law for the status of State organs. In some systems the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading. The internal law of a State may not classify, exhaustively or at all, which entities have the status of 'organs'. In such cases, while the powers of an entity and its relation to other bodies under internal law will be relevant to its classification as an 'organ', internal law will not itself perform the task of classification."[21]

A similar reasoning could be made with regard to the corresponding system of law relating to international organizations.

15. It is noteworthy that, while some provisions of the Charter of the United Nations use the term "organs",[22] the International Court of Justice, when considering the status of persons acting for the United Nations, gave relevance only to the fact that a person had been conferred functions by an organ of the United Nations. The Court used the term "agents" and did not give relevance to the fact that a person had or did not have an official status. In its advisory opinion on *Reparation for injuries suffered in the service of the United Nations*, the Court noted that the question addressed by the General Assembly concerned the capacity of the United Nations to bring a claim in case of injury caused to one of its agents and said:

> "The Court understands the word 'agent' in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the

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[19] Memorandum dated 21 April 1995, *United Nations Juridical Yearbook* (1995), pp. 464-465. The Assistant Secretary-General for Legal Affairs, Mr. Ralph Zacklin, reiterated in a letter of 4 May 1998 relating to the same case: "The responsibility for implementing and enforcing mandatory sanctions imposed by the Security Council of the United Nations rests with States."

[20] See footnote 6 above.

[21] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), chap. IV, sect. E.2, para. 11 of the commentary, p. 90.

[22] Article 7 of the Charter of the United Nations refers to "principal organs" and to "subsidiary organs". This latter term appears also in articles 22 and 30.

organization with carrying out, or helping to carry out, one of its functions — in short, any person through whom it acts."[23]

In the later advisory opinion on the *Applicability of article VI, section 22, of the Convention on the privileges and immunity of the United Nations*, the Court noted that:

"In practice, according to the information supplied by the Secretary-General, the United Nations has had occasion to entrust missions — increasingly varied in nature — to persons not having the status of United Nations officials."[24]

With regard to privileges and immunities, the Court also said in the same opinion:

"The essence of the matter lies not in their administrative position but in the nature of their mission."[25]

16. More recently, in its advisory opinion on *Difference relating to immunity from legal process of a special rapporteur of the Commission on Human Rights*, the Court pointed out that:

"the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity."[26]

In the same opinion the Court briefly addressed also the question of attribution of conduct, noting that in case of:

"[...] damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity [t]he United Nations may be required to bear responsibility for the damage arising from such acts."[27]

Thus, according to the Court, conduct of the United Nations includes, apart from that of its principal and subsidiary organs, acts or omissions of its "agents". This term is intended to refer not only to officials but also to other persons acting for the United Nations on the basis of functions conferred by an organ of the organization.

17. The same view was endorsed by several scholars, who premised attribution of conduct on the existence of a functional link between the agent and the organization, generally through one of its organs, which are established, directly or indirectly, on the basis of the constituent instrument of the organization.[28]

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[23] *I.C.J. Reports 1949*, p. 174 at p. 177.

[24] *I.C.J. Reports 1989*, p. 177 at p. 194, para. 48.

[25] Ibid., p. 194, para. 47.

[26] *I.C.J. Reports 1999*, p. 62 at p. 88, para. 66.

[27] Ibid., pp. 88-89, para. 66.

[28] C. Eagleton, "International Organization and the Law of Responsibility", *Recueil des cours de l'Académie de Droit international de La Haye*, vol. 76 (1950-I), p. 323 at p. 387, held that "the United Nations may be expected to assume responsibility for acts of [its] agents injurious to others". E. Butkiewicz, "The Premisses of International Responsibility of Inter-Governmental Organizations", *Polish Yearbook of International Law*, vol. 11 (1981-1982), p. 117 at p. 132, considered "behaviour of persons remaining with [the organization] in a functional relationship (the organs of the organization, the persons employed by it)". According to C. Tomuschat, "The International Responsibility of the European Union", in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations* (The Hague/London/New York: Kluwer Law International, 2002), p. 177 at p. 180, "conduct shown by a given individual must be capable of

18. What was stated by the International Court of Justice with regard to the United Nations applies more generally to international organizations, most of which act through their organs (whether so defined or not) and a variety of agents to which the organization's functions are entrusted. As was stated in a decision of the Swiss Federal Council of 30 October 1996:

> "As a rule, one may attribute to an international organization acts and omissions of its organs of all rank and nature and of its agents in the exercise of their competencies."[29]

19. In order to establish the existence of a link between an organ or an agent and an international organization, it would be inappropriate to refer to the organization's "internal law" in attempting to model the reference to the one expressed in article 4 on State responsibility (see para. 14 above). As was noted by the Commission on a previous occasion:

> "[t]here would [be] problems in referring to the 'internal law' of an organization, for while it has an internal aspect, this law has in other respects an international aspect."[30]

20. The term that is generally used with regard to international organizations is "rules of the organization". In article 2(1)(j) of the Vienna Convention of 21 March 1986 on the Law of Treaties between States and international organizations and between international organizations, which is the most recent codification convention that includes a definition of the term, one may find the following text:

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being attributed to the IO inasmuch as that individual is authorized to act on behalf of the IO". Several authors refer to the condition that "control" is exercised over a person entrusted with a function by an organ of the organization. See, for instance, J.-P. Ritter, "La protection diplomatique à l'égard d'une organisation internationale", op. cit. (see footnote 10 above), p. 441; M. Perez Gonzalez, "Les organisations internationales et le droit de la responsabilité", *Revue générale de Droit international public*, vol. 99 (1988), p. 63 at p. 88; C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge: Cambridge University Press, 1996), p. 241; P. Sands and P. Klein (eds.), *Bowett's Law of International Institutions*, 5th ed. (London: Sweet § Maxwell, 2001), p. 520. The existence of control may be taken as implied in the establishment of a formal link, such as the conferral of a mission to a person by an organ of the organization. P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, op. cit. (see footnote 18 above), p. 378, goes a step further by postulating control on the part of the organization as the main criterion for attribution. This view approaches that of G. Arangio-Ruiz, "State Fault and the Forms and Degrees of International Responsibility: Questions of Attribution and Relevance", in: *Le droit international au service de la justice et du développement. Mélanges Michel Virally* (Paris: Pedone, 1991), p. 25 at p. 33, who considered that only "factual standards or criteria" were relevant in order to establish a link between an individual and a State. The latter author, while denying the existence of rules on attribution under international law, did not exclude the usefulness of "a few presumptions" like those appearing in articles 4 to 11 on State responsibility. See G. Arangio-Ruiz, "Dualism Revisited. International Law and Interindividual Law", *Rivista di Diritto internazionale*, vol. 86 (2003), p. 909 at p. 985.

[29] This is a translation from the original French, which reads as follows: "En règle générale, sont imputables à une organisation internationale les actes et omissions de ses organes de tout rang et de toute nature et de ses agents dans l'exercice de leurs compétences". Doc. VPB 61.75, published on the Swiss Federal Council's web site.

[30] *Yearbook ... 1982*, vol. II, Part Two, p. 21.

"'rules of the organization' means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization."[31]

21. In reply to a question addressed by the Commission in its 2003 report[32] several State representatives in the Sixth Committee expressed the view that the draft articles should use the above definition when stating a general rule on attribution of conduct to international organizations.[33] However, a few representatives dissented,[34] while some of the representatives who in general favoured retention of the definition also said that the same definition should be further elaborated.[35] The Legal Counsel of the World Health Organization wrote that the definition "would be adequate, at least as a point of departure for a definition more suitable to the specific purpose of the draft articles".[36]

22. One important feature of the above definition of "rules of the organization" is that it gives considerable weight to practice. The definition appears to provide a balance between the rules enshrined in the constituent instrument and formally accepted by members, on the one hand, and the needs for the organization to

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[31] A/CONF.129/15. A partly different definition may be found in article 1(1)(34) of the Vienna Convention of 14 March 1975 on the representation of States in their relations with international organizations of a universal character (A/CONF.67/16), which reads:

"'rules of the organization' means, in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the organization."

The same wording had been proposed by the Commission in draft article 2(1)(j) on the question of treaties concluded between States and international organizations or between two or more international organizations. *Yearbook ... 1982*, vol. II (Part Two), p. 18. In article 2(c) of its resolution on "The legal consequences for member States of the non-fulfilment by international organizations of their obligations toward third parties", adopted at Lisbon in 1995, the Institute of International Law gave the following definition:

"'Rules of the organization' means the constituent instruments of the organization and any amendments thereto, regulations adopted thereunder, binding decisions and resolutions adopted in accordance with such instruments and the established practice of the organization." Institute of International Law, *Yearbook*, vol. 66 (Part II), p. 447.

[32] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), chap. III, sect. A, para. 27.

[33] Statements by Denmark, also on behalf of Finland, Iceland, Norway and Sweden (A/C.6/58/SR.14, para. 25), Austria (ibid., para. 33), Japan (ibid., para. 37), Italy (ibid., para. 45), France (ibid., para. 58), Canada (A/C.6/58/SR.15, paras. 1-2), Greece (ibid., para. 12), Israel (ibid., para. 20), Portugal (ibid., para. 27), Russian Federation (ibid., para. 30), Spain (ibid., para. 40), Belarus (ibid., para. 42), Egypt (A/C.6/58/SR.16, para. 1), Romania (A/C.6/58/SR.19, para. 53), Venezuela (A/C.6/58/SR.21, para. 21), Sierra Leone (ibid., para. 25) and Mexico (ibid., para. 47).

[34] The definition was viewed as "not satisfactory" in the statement of Gabon (A/C.6/58/SR.15, para. 4), "since in matters involving responsibility it was desirable to have the widest possible sphere of application". The statement of Argentina (ibid., para. 24) considered that "prima facie it would not be advisable to refer to the definition of the 'rules of the organization' contained in the Vienna Convention".

[35] Statements of Japan (A/C.6/58/SR.14, para. 37), Italy (ibid., para. 45), France (ibid., para. 58) and Portugal (A/C.6/58/SR.15, para. 27). The latter statement suggested that "other components of the rules of the organization might be considered with a view to formulating a more exhaustive definition".

[36] Letter from the Legal Counsel of the World Health Organization, Mr. Thomas S. R. Topping, addressed on 19 December 2003 to the United Nations Legal Counsel, Mr. Hans Corell. The letter added: "What matters most in this case is the retention of a reference to the established practice of the organization as one category of 'rules' of that organization."

develop as an institution.[37] As the International Court of Justice said in its advisory opinion on *Reparation for injuries suffered in the service of the United Nations*:

> "Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice."[38]

23. Practice is one of the key elements to be taken into consideration when interpreting the constituent instrument of an international organization. Thus, in its opinion on *Legal consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, the International Court of Justice interpreted Article 27, paragraph 3, of the Charter of the United Nations in the light of practice:

> "[...] the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions. [...] This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization."[39]

More recently, in its advisory opinion on *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the Court stated:

> "[...] the constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret those constituent treaties."[40]

24. The relevance of practice was discussed by the Court in the passages quoted above first in relation to a provision concerning the Security Council's decision-making process and then the World Health Organization's competence. The definition of the "rules of the organization" quoted above (para. 20) is taken from

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[37] This point was clearly expressed by C. de Visscher, "L'interprétation judiciaire des traités d'organisation internationale", *Rivista di Diritto internazionale*, vol. 61 (1958), p. 177 at p. 187.

[38] *I.C.J. Reports 1949*, p. 174 at p. 180. This passage was approvingly quoted in the hereto unpublished partial award of 22 November 2002 of the arbitral tribunal in *Reineccius et al. v. Bank for International Settlements*. The tribunal added: "The fact that the Bank has, on a number of occasions, amended its Statute by the introduction of a new article appears to be probative of the authoritative interpretation of the Statute in this regard" (para. 145).

[39] *I.C.J. Reports 1971*, p. 12 at p. 22 (para. 22).

[40] *I.C.J. Reports 1996*, p. 66 at p. 75 (para. 19). At p. 76 (p. 21) the Court reiterated that the constituent instrument had to be interpreted "in the light of [...] the practice followed by the Organization".

the Vienna Convention on the Law of Treaties between States and international organizations and between international organizations, in which the term is used with regard to an organization's capacity and competence to conclude a treaty.[41] The question may be raised whether, for the purpose of attribution of conduct in view of international responsibility, practice should not be given a wider significance than when the organization's capacity or competence is discussed. It may be held that, when practice develops in a way that is not consistent with the constituent instrument, the organization should not necessarily be exempt from responsibility in case of conduct that stretches beyond the organization's competence. However, the possibility of attribution of conduct in this case may be taken into account when considering ultra vires acts of the organization and need not affect the general rule on attribution.

25. The above definition of "rules of the organization" seems capable of improvement in two ways. First, the reference to "decisions and resolutions" is imprecise, because the terms used vary (for instance, resolutions may include decisions) and also because the legal significance of the various acts of an organization are different. Clearly, the definition is intended to give a broad description of what may be relevant. However, it could be framed in a theoretically more appropriate way, which would be both more accurate and more comprehensive. What seems to matter is that the functions are conferred on the organ, official or other person by an act of the organization which is taken in accordance with the constituent instrument. A second possible improvement concerns the term "established practice". This wording puts the stress on the element of time, which is not necessarily relevant, while it expresses less clearly the role of general acceptance, which appears to be more significant.[42] Thus, it seems preferable to consider alternatives to these two aspects of the current definition. Both the wording of that definition and some possible alternatives are set in brackets in the draft article below (see para. 28).

26. A further question would be whether the definition to be given of "rules of the organization" should be included in draft article 4 or placed in draft article 2, which contains the definition of international organizations. The decision may be postponed to the time when it will become clearer whether the term "rules of the organization" appears only in the context of the general rule on attribution of conduct or whether the same term will be used also in other provisions. In the latter case it would be preferable to move to draft article 2 what is currently suggested as paragraph 3 of draft article 4.

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[41] The term "rules of the organization" is used in the Convention in a preambular paragraph, in article 6 ("Capacity of international organizations to conclude treaties"), in article 46 ("Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties"), and, with regard to assent on the part of an international organization, in articles 35 ("Treaties providing for obligations for third States or third organizations") and 36 ("Treaties providing for rights for third States or third organizations"). See footnote 31 above.

[42] The role of "general acceptance" was underlined by the International Court of Justice in the first passage quoted above, para. 23. According to C. F. Amerasinghe, "Interpretation of Texts in Open International Organizations", *British Year Book of International Law*, vol. 65 (1994), p. 175 at p. 200, one should "base the use of subsequent practice in the interpretation of constitutions on agreement or consent". However, he appeared to refer only to acceptance "at the time [a State] became a party to the constitutive treaty".

27. According to article 4(1) on State responsibility, attribution to a State of conduct of an organ takes place "whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State".[43] The latter specification could hardly apply to an international organization. The other elements may be retained, but they could be covered by simpler wording. In particular, there is no need to specify the type of function exercised by the organization, also in view of the fact that, while all States may be held to exert all the mentioned functions, organizations vary significantly from one another also in this regard.

28. On the basis of the foregoing remarks, draft article 4 should be placed at the beginning of a chapter called "Attribution of conduct to an international organization". The following wording is suggested:

"Article 4
"General rule on attribution of conduct to an international organization

"1. The conduct of an organ of an international organization, of one of its officials or another person entrusted with part of the organization's functions shall be considered as an act of that organization under international law, whatever position the organ, official or person holds in the structure of the organization.

"2. Organs, officials and persons referred to in the preceding paragraph are those so characterized under the rules of the organization.

"3. For the purpose of this article, "rules of the organization" means, in particular, the constituent instruments, [decisions and resolutions] [acts of the organization] adopted in accordance with them, and [established] [generally accepted] practice of the organization."

IV. Conduct of organs placed at the disposal of an international organization by a State or another international organization

29. Given the limited resources that international organizations possess for pursuing their objectives, they often have to rely on State organs for assistance. One way in which States assist organizations is by putting some of their own organs at the organizations' disposal. The case of a State placing one of its organs at an organization's disposal is certainly more frequent than the reciprocal phenomenon: an organization putting one of its organs at a State's disposal.

30. The draft articles on State responsibility that were adopted at first reading included in article 9 a reference to the case in which an organ had "been placed at the disposal of a State by [...] an international organization". The same rule was regarded as applicable to this case as the one applying to the case in which an organ

[43] See footnote 6 above.

was put by a State at another State's disposal.[44] The reference to international organizations was removed during the second reading,[45] together with all similar references that had been included at first reading in the chapter on attribution of conduct. In the second-reading text, article 57 simply contains a without-prejudice clause,[46] which is designed to leave issues relating to international organizations open for further study. However, the commentary on article 57 briefly considered the converse case of a State placing one of its organs at an organization's disposal, and said:

> "[...] if a State seconds officials to an international organization so that they act as organs or officials of the organization, their conduct will be attributable to the organization, not the sending State [...]".[47]

31. When an organ is placed by a State or an international organization at the disposal of another State or another organization, the issue relating to attribution will generally not be whether conduct of that organ is attributable at all to a State or an organization. The question will rather be to which State or organization conduct is attributable: whether to the lending State or organization or to the borrowing State or organization. Moreover, dual attribution of the same conduct cannot be excluded (see above, paras. 6-7).

32. Questions concerning attribution of conduct to the United Nations or a State have sometimes been raised in relation to conduct taken by military forces in the course of interventions recommended or authorized by the Security Council. In this type of case, responsibility of the United Nations, if any, could not be premised on attribution of conduct. It could not be said that authorized forces are placed at the disposal of the United Nations. This is confirmed by practice. During the Korean war, United States forces mistakenly bombed targets on the territory of China and the Soviet Union. With regard to China, the United States Government finally accepted:

> "[...] to assume responsibility for and pay compensation through the United Nations, for damages which an impartial, on-the-spot investigation might show to have been caused by United States forces."[48]

The United States Government also expressed "its regret that American forces under United Nations Command should have been involved" in the violation of Soviet sovereignty, and declared that it was "prepared to supply funds for payment of any

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[44] Article 9 adopted at first reading read as follows:

> "The conduct of an organ which has been placed at the disposal of a State by another State or by an international organization shall be considered as an act of the former State under international law, if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed."

Yearbook ... 1974, vol. I, 1278th meeting, para. 39, p. 154.

[45] *Yearbook* ... 1998, vol. II (Part Two), p. 85 (paras. 425-426).

[46] See footnote 6 above.

[47] *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), chap. IV, sect. E.2, para. 3 of the commentary, p. 361.

[48] Letter dated 26 September 1950 from the Deputy Representative of the United States of America to the Secretary-General concerning the bombing by air force of the territory of China (S/1813). The representative of the United States had denied responsibility with regard to an earlier and similar claim (S/1722), arguing that conduct had to be attributed to "the United Nations in Korea" (S/1727).

damages determined by a United Nations Commission or other appropriate procedure to have been inflicted upon Soviet property."[49]

33. When forces operate outside the United Nations chain of command, the United Nations constantly held that conduct had to be attributed to the respective national State. For instance, the Director of the Field Administration and Logistics Division of the Department of Peacekeeping Operations of the United Nations, wrote to the Permanent Representative of Belgium to the United Nations about a claim resulting from a car accident in Somalia:

> "[T]he Belgian troops in Somalia at the time of the accident, 13 April 1993, formed part of the Unified Task Force established by the Security Council in its resolution 794 (1992) and not the United Nations Operation in Somalia (UNOSOM). In fact, the only Belgian nationals to have formed part of UNOSOM were headquarters staff officers. The individual involved in this accident stated in his interview that he worked as a cook as part of 'Operation Restore Hope'; he could not therefore be considered to have been part of the United Nations operation. UNITAF troops were not under the command of the United Nations and the Organization has consistently declined liability for any claims made in respect of incidents involving those troops."[50]

This approach appears to have been generally accepted by States whose forces were involved in operations authorized by the Security Council.[51]

34. Most of the practice concerning attribution of conduct in case of a State organ placed at an organization's disposal relates to peacekeeping forces.[52] This is the apparent reason why in its 2003 report the Commission expressed the wish to receive the Governments' views on practice relating to the "extent to which the conduct of peacekeeping forces is attributable to the contributing State and the extent to which it is attributable to the United Nations".[53] The Commission did not suggest that these replies would help it to draft a specific rule on attribution of conduct of peacekeeping forces. Not only would such an endeavour be at odds with the pattern of the articles on State responsibility that the Commission had declared it intended to follow, stating a specific rule would also be difficult in view of the variety of meanings that is often attributed to the term "peacekeeping force".

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[49] Note dated 19 October 1950 from the representative of the United States of America addressed to the Secretary-General (S/1856).

[50] Unpublished letter dated 25 June 1998.

[51] For instance, the Canadian Government paid compensation for the killing of a Somali youth by some members of the Canadian contingent in UNITAF. See R. M. Young and M. Molina, "IHL and Peace Operations: Sharing Canada's lessons learned from Somalia", *Yearbook of International Humanitarian Law*, vol. 1 (1998), p. 362 at p. 366.

[52] As the United Nations Legal Counsel, Mr. Hans Corell, wrote on 3 February 2004 to the Director of the Codification Division, Mr. Václav Mikulka, it is "in connection with peacekeeping operations where principles of international responsibility [...] have for the most part been developed in a fifty-year practice of the Organization".

[53] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), chap. III, sect. A, para. 27.

35. Peacekeeping forces are regarded as subsidiary organs of the United Nations. However, they are made up of State organs, and therefore the question of attribution of conduct is not clear-cut. The first instance in which the United Nations acknowledged its responsibility for the conduct of national contingents occurred when the Secretary-General settled claims with Belgium and a few other States in relation to damages suffered by their respective nationals in the Congo as the result of harmful acts of United Nations Operations in the Congo (ONUC) personnel. The agreements included the following sentence:

> "The United Nations has stated that it would not evade responsibility where it was established that United Nations agents had in fact caused unjustifiable damage to innocent parties."[54]

This attitude of the United Nations was reasserted on several occasions. For instance, a memorandum of the Office of Legal Affairs stated with regard to an accident that occurred to a British helicopter which had been put in Cyprus at the disposal of the United Nations Peacekeeping Force in Cyprus (UNFICYP):

> "The crew members of the helicopters are members of the British contingent of UNFICYP and the helicopter flights take place in the context of the operations of UNFICYP. Through the chain of command, the operations in which the helicopters are involved take place under the ultimate authority of the UNFICYP Force Commander and are the responsibility of the United Nations. The circumstances under which the British-owned helicopters are put at the disposal of UNFICYP thus lead to the conclusion that these helicopters should be considered as United Nations aircraft. As the carrier, it is the United Nations that could and normally would be held liable by third parties in case of accidents involving UNFICYP helicopters and causing damages or injuries to these parties; therefore third-party claims should normally be expected to be addressed to the United Nations."[55]

36. The Secretary-General summed up as follows the current position concerning responsibility of the United Nations for conduct of peacekeeping forces:

> "In recognition of its international responsibility for the activities of its forces, the United Nations has, since the inception of peacekeeping operations, assumed its liability for damage caused by members of its forces in the performance of their duties. [...] The undertaking to settle disputes of a private law nature submitted against it and the practice of actual settlement of such third-party claims [...] evidence the recognition on the part of the United Nations that liability for damage caused by members of United Nations forces is attributable to the Organization."[56]

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[54] United Nations, *Treaty Series*, vol. 535, p. 191 at p. 199. Similar agreements were concluded with Greece (ibid., vol. 565, p. 3), Italy (ibid., vol. 588, p. 197), Luxembourg (ibid., vol. 585, p. 147) and Switzerland (ibid., vol. 564, p. 193). Reference to an agreement with Zambia was made in *United Nations Juridical Yearbook* (1975), p. 155. As was noted by P. de Visscher, "Les conditions d'application des lois de guerre aux opérations militaires des Nations Unies. Rapport préliminaire", Institut de Droit international, *Annuaire*, vol. 54 (1971-I), p. 1 at pp. 54-55, no suggestion was made that the national State of the forces involved would have to be held responsible.

[55] *United Nations Juridical Yearbook* (1980), pp. 184-185.

[56] Report of the Secretary-General on financing of United Nations peacekeeping operations (A/51/389), paras. 7-8, p. 4.

While reference is made here and in other instances to private law claims, it is implied that the same principle concerning attribution of conduct would apply in relation to responsibility under international law. This transition was clearly made in the following passage of a recent statement of the United Nations Legal Counsel:

> "As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation. The fact that any such act may have been performed by members of a national military contingent forming part of the peacekeeping operation does not affect the international responsibility of the United Nations vis-à-vis third States or individuals."[57]

37. The question of attribution of conduct of a member of a national contingent was similarly solved by the Superior Provincial Court of Vienna (Oberlandesgericht Wien) in a judgement of 26 February 1979. The claim had been brought against the Austrian State because the member of an Austrian contingent in United Nations Disengagement Observer Force had caused damage to property in the barracks. The Court found:

> "[W]hat is decisive is not whose organ (from the organizational standpoint) the person alleged to have caused the damage actually was, but rather in whose name and for whom (from the functional standpoint) that person was acting at the moment when the act occurred. What is decisive is therefore the sphere in which the organ in question was acting at the relevant time."[58]

38. However, attribution of conduct of national contingents should also take into account the fact that the respective State retains control over disciplinary matters and has exclusive jurisdiction in criminal affairs.[59] This is generally specified in the agreements that the United Nations concludes with the contributing States.[60] Thus the national contingent is not fully placed at the disposal of the United Nations and this may have consequences with regard to attribution of conduct. For instance, the Office of Legal Affairs of the United Nations took the following line:

> "Since the Convention [on International Trade in Endangered Species of Wild Fauna and Flora] places the responsibility for enforcing its provisions on the States parties and since the troop-contributing States retain jurisdiction over the criminal acts of their military personnel, the responsibility for enforcing

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[57] See footnote 52 above.

[58] This passage is taken from the English translation reproduced in *International Law Reports*, vol. 77, p. 470 at p. 472. The original text of the judgement may be read in *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht*, vol. 31 (1980), p. 310.

[59] As was stated in a memorandum of the Legal Bureau of the Canadian Department of Foreign Affairs:

> "[U]ltimately any prosecution for acts contrary to the ROE [rules of engagement] (or contrary to international or domestic law) will be done by the national authorities of the troop-contributing States. This is a standard practice of all armed forces involved in peacekeeping activities."

P. Kirsch (ed.), "Canadian Practice in International Law", *Canadian Yearbook of International Law*, vol. 34 (1996), p. 387 at p. 388.

[60] See for example, with reference to "disciplinary authority" and to "jurisdiction with respect to any crime or offence", the agreements concerning service with the United Nations Peacekeeping Force in Cyprus (UNFICYP), *United Nations Juridical Yearbook* (1966), p. 41. More generally on these clauses, the Secretary-General's report (A/49/681), para. 6.

the provisions of the Convention rests with those troop-contributing States which are parties to the Convention."[61]

39. Although not directly relevant in the case, the retention of disciplinary power and criminal jurisdiction on the part of the contributing State was an important element that led the House of Lords to find in *Attorney General v. Nissan* that the Government of the United Kingdom had to pay compensation for the temporary occupation of a building by British forces which were part of UNFICYP.[62] This was particularly clear in the opinion of Lord Morris of Borth-y-Gest:

> "[...] though national contingents were under the authority of the United Nations and subject to the instructions of the commander, the troops as members of the force remained in their national service. The British forces continued, therefore, to be soldiers of Her Majesty. Members of the United Nations force were subject to the exclusive jurisdiction of their respective national state in respect of any criminal offences committed by them in Cyprus."[63]

40. It would be going too far to consider that the existence of disciplinary power and criminal jurisdiction on the part of the contributing State totally excludes forces being considered to be placed at the disposal of the United Nations. As has been held by several scholars,[64] the decisive question in relation to attribution of a given conduct appears to be who had effective control over the conduct in question. For instance, it would be difficult to attribute to the United Nations conduct of forces in

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[61] *United Nations Juridical Yearbook* (1994), p. 450.

[62] *All England Law Reports* (1969), vol. 1, p. 639. The House of Lords reversed the decision of the Court of Appeal, ibid. (1967), vol. 2, p. 1241, in which Lord Denning had held that the British troops that were part of UNFICYP "were acting as agents of the United Nations".

[63] *All England Law Reports* (1969), vol. 1, p. 646.

[64] J.-P. Ritter, "La protection diplomatique à l'égard d'une organisation internationale", op. cit. (see footnote 10 above), p. 442; R. Simmonds, *Legal Problems Arising from the United Nations Military Operations* (The Hague: Nijhoff, 1968), p. 229; B. Amrallah, "The International Responsibility of the United Nations for Activities Carried Out by U.N. Peace-Keeping Forces", *Revue égyptienne de droit international*, vol. 32 (1976), p. 57, at pp. 62-63 and 73-79; E. Butkiewicz, "The Premisses of International Responsibility of Inter-Governmental Organizations", op. cit. (see footnote 28 above), pp. 123-125 and 134-135; M. Perez Gonzalez, "Les organisations internationales et le droit de la responsabilité", op. cit. (see footnote 28 above), p. 83; M. Hirsch, *The Responsibility of International Organizations toward Third Parties* (Dordrecht/London: Nijhoff, 1995), pp. 64-67; C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, op. cit. (see footnote 28 above), pp. 241-243; P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, op. cit. (see footnote 18 above), pp. 379-380; I. Scobbie, "International Organizations and International Relations", op. cit. (above, footnote 28), p. 891; C. Pitschas, *Die völkerrechtliche Verantwortlichkeit der europäischen Gemeinschaften und ihrer Mitgliedstaaten* (Berlin: Duncker § Humblot, 2001), p. 52; J.-M. Sorel, "La responsabilité des Nations Unies dans les opérations de maintien de la paix", *International Law Forum*, vol. 3 (2001), p. 127 at p. 129. Some authors refer to "effective control", some others to "operational control". The latter concept was used also by M. Bothe, *Streitkräfte internationaler Organisationen* (Köln/Berlin: Heymanns Verlag, 1968), p. 87. Difficulties in drawing a line between operational and organizational control were underlined by L. Condorelli, "Le statut des forces de l'ONU et le droit international humanitaire", *Rivista di Diritto internazionale*, vol. 78 (1995), p. 881 at pp. 887-888. The draft suggested by the Committee on Accountability of International Organizations of the International Law Association referred to a criterion of "effective control (operational command and control)". International Law Association, *Report of the Seventieth Conference held in New Delhi, 2-6 April 2002* (2002), p. 797.

circumstances such as those described in the report of the Commission of inquiry which was established in order to investigate armed attacks on UNOSOM II personnel:

> "The Force Commander of UNOSOM II was not in effective control of several national contingents which, in varying degrees, persisted in seeking orders from their home authorities before executing orders of the Forces Command. Many major operations undertaken under the United Nations flag and in the context of UNOSOM's mandate were totally outside the command and control of the United Nations, even though the repercussions impacted crucially on the mission of UNOSOM and the safety of its personnel."[65]

41. The United Nations Secretary-General held that the criterion of the "degree of effective control" was decisive with regard to joint operations:

> "The international responsibility of the United Nations for combat-related activities of United Nations forces is premised on the assumption that the operation in question is under the exclusive command and control of the United Nations. [...] In joint operations, international responsibility for the conduct of the troops lies where operational command and control is vested according to the arrangements establishing the modalities of cooperation between the State or States providing the troops and the United Nations. In the absence of formal arrangements between the United Nations and the State or States providing troops, responsibility would be determined in each and every case according to the degree of effective control exercised by either party in the conduct of the operation."[66]

What has been held with regard to joint operations, such as those involving UNOSOM II and the Quick Reaction Force in Somalia, should also apply to peacekeeping operations, insofar as it is possible to distinguish in their regard areas of effective control respectively pertaining to the United Nations and the contributing State. While it is understandable that, for the sake of efficiency of military operations, the United Nations insists on claiming exclusive command and control over peacekeeping forces, attribution of conduct should also in this regard be based on a factual criterion.

42. With regard to infringements of international humanitarian law, the United Nations Secretary-General referred to "concurrent responsibility" of the United Nations and the contributing State, without clarifying the basis of responsibility.[67] This would depend on the circumstances of the infringement. One may have to conclude for joint attribution of the same conduct; however, one could also consider that the infringing acts are attributed to either the State or the United Nations, while omission, if any, of the required preventive measures is attributed to the other

[65] S/1994/653, paras. 243-244, p. 45.

[66] A/51/389, paras. 17-18, p. 6.

[67] A/51/389, para. 44, p. 11. The Secretary-General's "Bulletin on observance by United Nations forces of international humanitarian law" (ST/SGB/1999/13, p. 1) does not address the question.

subject.[68] Similar conclusions may be reached with regard to infringements by members of peacekeeping forces that affect other areas of the protection of human rights.[69]

43. Arrangements that are concluded between the United Nations and the contributing State only concern the parties and do not affect the question of attribution of conduct under general international law. In any case, the model contribution agreement asserts the liability of the United Nations towards third parties and only provides for a right of recovery of the United Nations under circumstances such as "loss, damage, death or injury [arising] from gross negligence or wilful misconduct of the personnel provided by the Government".[70]

44. In reply to a question put by the Commission in its 2003 report,[71] several State delegates held in the United Nations Sixth Committee that conduct of peacekeeping forces had to be generally attributed to the United Nations.[72] However, some delegates also found that in certain cases attribution had to be made concurrently,[73] or even exclusively,[74] to the contributing State. Some statements stressed the

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[68] L. Condorelli, "Le azioni del l'ONU e l'applicazione del diritto internazionale umanitario: il 'bollettino' del Segretario generale del 6 agosto 1999", *Rivista di Diritto internazionale*, vol. 82 (1999), p. 1049 at p. 1053, and P. Benvenuti, "Le respect du droit international humanitaire par les forces des Nations Unies: la circulaire du Secrétaire général", *Revue général de Droit international public*, vol. 105 (2001), p. 355 at p. 370, held that the United Nations are under an obligation to ensure that the contributing State exercises criminal jurisdiction in case of infringements of international humanitarian law.

[69] This prompted the United Nations Office of Internal Oversight Services to conduct investigations on charges of sexual exploitation in various countries. See "The U.N. and the Sex Slave Trade in Bosnia: Isolated Case or Larger Problem in the U.N. System?", Hearing before the Subcommittee on International Operations and Human Rights of the Committee on International Relations, House of Representatives, 24 April 2002 (Washington: U.S. Government Printing Office, 2002). For a critical survey, see J. Murray, "Who will police the peace-builders? The failure to establish accountability for participation of United Nations civilian police in the trafficking of women in post-conflict Bosnia and Herzegovina", *Columbia Human Rights Law Review*, vol. 34 (2002-2003), p. 475, especially p. 518 ff.

[70] Article 9 of the model contribution agreement (A/50/995, annex; A/51/967, annex). While the text says that "the Government will be liable for such claims", a right of recourse appears to be intended. A later report by the Secretary-General (A/51/389, para. 43, pp. 10-11) referred to this text under the heading "Recovery from States contributing contingents: concurrent responsibility". A similar text is contained in the model agreement used by the United Nations to obtain gratis personnel (ST/AI/1999/6, annex).

[71] See para. 34 of the present report.

[72] Statements by Denmark, also on behalf of Finland, Iceland, Norway and Sweden (A/C.6/58/SR.14, para. 27), Austria (ibid., para. 33), Italy (ibid., para. 46), Canada (A/C.6/58/SR.15, para. 3), Gabon (ibid., para. 5), Greece (ibid., para. 13), Israel (ibid., para. 21), Russian Federation (ibid., para. 31), Spain (ibid., para. 41), Belarus (ibid., para. 43), Egypt (A/C.6/58/SR.16, para. 2) and Mexico (A/C.6/58/SR.21, para. 48).

[73] Statements by Denmark, also on behalf of Finland, Iceland, Norway and Sweden (A/C.6/58/SR.14, para. 28), Greece (A/C.6/58/SR.15, para. 13) and Israel (ibid., para. 21).

[74] Statements by Austria (A/C.6/58/SR.14, para. 33), Italy (ibid., para. 46), Canada (A/C.6/58/SR.15, para. 3), Gabon (ibid., para. 5), Israel (ibid., para. 21), Russian Federation (ibid., para. 31), Belarus (ibid., para. 43) and Egypt (A/C.6/58/SR.16, para. 2).

importance of the criterion of control in order to determine to whom conduct had to be attributed.[75]

45. The principles applicable to peacekeeping forces may be extended to other State organs put at the disposal of the United Nations, such as disaster relief units, about which the United Nations Secretary-General wrote:

> "If the disaster relief unit is itself established by the United Nations, the unit would be a subsidiary organ of the United Nations. A disaster relief unit of this kind would be similar in legal status to, for example, the United Nations Force in Cyprus (UNFICYP) [...]"[76]

46. Similar conclusions would have to be reached in the rarer case that an international organization places one of its organs at the disposal of another international organization. An example is provided by the Pan American Sanitary Conference, which, as a result of an agreement between the World Health Organization (WHO) and the Pan American Health Organization (PAHO), serves "respectively as the Regional Committee and the Regional Office of the World Health Organization for the Western Hemisphere, within the provisions of the Constitution of the World Health Organization".[77] The Legal Counsel of WHO noted that:

> "On the basis of that arrangement, acts of PAHO and of its staff could engage the responsibility of WHO."[78]

47. Article 6 on State responsibility considers that the decisive criterion for attribution to a State of conduct of an organ placed at its disposal by another State is the fact that "the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed".[79] Reference to governmental authority would not be appropriate with regard to international organizations, which only rarely exercise that type of authority. Reference should be made more generally to the exercise of an organization's functions.

48. Article 6 on State responsibility does not provide any elements in order to identify when a certain organ is placed at the "disposal" of another State. However, some kind of control on the part of the beneficiary State is implied. The relevant commentary specifies that:

> "In performing the functions entrusted to it by the beneficiary State, the organ must also act in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State."[80]

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[75] Statements by Italy (A/C.6/58/SR.14, para. 46), Canada (A/C.6/58/SR.15, para. 3), Israel (ibid., para. 21), Russian Federation (ibid., para. 31), Spain (ibid., para. 41), Belarus (ibid., para. 43) and Mexico (A/C.6/58/SR.21, para. 48). The statement by Greece (A/C.6/58/SR.15, para. 13) referred to "authority and command" as the criterion for attributing conduct of peacekeeping forces to the United Nations.

[76] *United Nations Juridical Yearbook* (1971), p. 187.

[77] Article 2 of the Agreement of 24 May 1949, reproduced at http://intranet.who.int.

[78] Letter from the Legal Counsel of WHO, Mr. Thomas S. R. Topping, addressed on 19 December 2003 to the United Nations Legal Counsel, Mr. Hans Corell.

[79] See footnote 6 above.

[80] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), chap. IV, sect. E.2, para. 2 of the commentary, p. 95.

This point could be made more explicitly in the text, in order to provide guidance in relation to questions of attribution arising when national contingents are placed at an organization's disposal and in similar cases. It should also be indicated that what matters is not exclusiveness of control, which for instance the United Nations never has over national contingents, but the extent of effective control. This would also leave the way open for dual attribution of certain conducts.

49. With regard to attribution of conduct to international organizations, draft article 4 (see above, para. 28) distinguishes between organs, officials and other persons entrusted with part of the organization's functions. It does not seem necessary to repeat these specifications, which would render the text cumbersome, if it is understood that what applies to organs of an international organization is also applicable to officials and other persons referred to in draft article 4.

50. The following wording is suggested:

> **"Article 5**
> **Conduct of organs placed at the disposal of an international organization by a State or another international organization**
>
> "The conduct of an organ of a State or an international organization that is placed at the disposal of another international organization for the exercise of one of that organization's functions shall be considered under international law an act of the latter organization to the extent that the organization exercises effective control over the conduct of the organ."

V. The question of the attribution of ultra vires conduct

51. Ultra vires conduct of an international organization could be either conduct beyond the powers conferred on the organization or conduct exceeding the powers of a specific organ. In its advisory opinion on *Legality of the use by a State of nuclear weapons in armed conflict*, the International Court of Justice stated that:

> "[...] international organizations [...] do not, unlike States, possess a general competence. International organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them."[81]

This statement does not imply that conduct which exceeds an international organization's function could never be attributed to that organization.

52. Clearly, an act which is ultra vires for an organization is also ultra vires for any of its organs. An organ may exceed its powers also because it impinges on those that are exclusively given to another organ or because it uses powers that have not been given to any organ. The possibility of attributing to an international organization acts that an organ takes ultra vires has been admitted by the International Court of Justice in its advisory opinion on *Certain expenses of the United Nations*, in which the Court said:

> "If it is agreed that the action in question is within the scope of the functions of the Organization but it is alleged that it has been initiated or carried out in a

[81] *I.C.J. Reports 1996*, p. 66 at p. 78 (para. 25).

> manner not in conformity with the division of functions among the several organs which the Charter prescribes, one moves to the internal plane, to the internal structure of the Organization. If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organization. Both national or international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an ultra vires act of an agent."[82]

53. The fact that the Court considered that the United Nations may have to bear expenses deriving from ultra vires acts of an organ reflects policy considerations that appear even stronger in relation to wrongful conduct, because denying attribution of conduct may deprive third parties of all redress, unless conduct could be attributed to a State or another organization.[83] The need to protect third parties requires an extension of attribution of conduct for the same reason that underpins the validity of treaties concluded by an international organization notwithstanding minor infringements of rules concerning competence to conclude treaties.[84] While in that context it may be argued that protection of third parties should be limited to those that relied in good faith on the organ's or official's conduct,[85] the same rationale does not apply in most cases of responsibility for unlawful conduct.

54. A distinction between the conduct of organs and officials, on the one hand, and that of persons entrusted with part of the organization's functions would find little justification in view of the limited significance that the distinction carries in the practice of international organizations.[86] The International Court of Justice appears to have asserted the organization's responsibility for ultra vires acts also of persons other than officials. In its advisory opinion on *Difference relating to immunity from legal process of a special rapporteur of the Commission on Human Rights*, the Court stated:

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[82] *I.C.J. Reports 1962*, p. 168.

[83] S. Dorigo, "Imputazione e responsabilità internazionale per l'attività delle forze di peacekeeping delle Nazioni Unite", *Rivista di diritto internazionale*, vol. 85 (2002), p. 903 at pp. 933-935, held that if a national contingent acts ultra vires because of pressure by the contributing State, conduct should be attributed only to that State.

[84] Reference is here made to article 46 of the Vienna Convention on the Law of Treaties between States and international organizations or between international organizations (see footnote 31 above).

[85] For that concern: M. H. Arsanjani, "Claims Against International Organizations. *Quis custodiet ipsos custodes*", *The Yale Journal of World Public Order*, vol. 2 (1981), p. 131 at p. 153; E. J. Aramburu, "Responsabilidad de los organismos internacionales y jurisprudencia argentina", *Jurisprudencia argentina*, No. 6200 (2000), p. 4. A. Reinisch, *International Organizations Before National Courts* (Cambridge: Cambridge University Press, 2000), pp. 80-81 appears to link responsibility to the validity of the ultra vires act.

[86] The Committee on Accountability of International Organizations of the International Law Association suggested the following rule:

> "The conduct of organs of an IO or of officials or agents of an Organization shall be considered an act of that Organization under international law if the organs or official or agent were acting in their official capacity, even if that conduct exceeds the authority granted or contradicts instructions given (ultra vires)."

International Law Association, *Report of the Seventieth Conference held in New Delhi 2-6 April 2002* (2002), p. 797.

> "[...] it need hardly be said that all agents of the United Nations, in whatever official capacity they act, must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations."[87]

The obvious reason why an agent — in the case in hand, an expert on mission — should care not to exceed the scope of his or her functions also in order to avoid that claims be preferred against the organization is that the organization could well be held responsible for the agent's conduct.

55. As with State organs, for responsibility to arise there needs to be some connection between the entity's or person's official duties and the conduct in question. This appears to underlie the position taken by the Office of Legal Affairs of the United Nations in a memorandum concerning claims involving off-duty acts of members of peacekeeping forces:

> "United Nations policy in regard to off-duty acts of the members of peace-keeping forces is that the Organization has no legal or financial liability for death, injury or damage resulting from such acts. [...] We consider the primary factor in determining an "off-duty" situation to be whether the member of a peace-keeping mission was acting in a non-official/non-operational capacity when the incident occurred and not whether he/she was in military or civilian attire at the time of the incident or whether the incident occurred inside or outside the area of operations [...] [W]ith regard to United Nations legal and financial liability a member of the Force on a state of alert may none the less assume an off-duty status if he/she independently acts in an individual capacity, not attributable to the performance of official duties, during that designated "state-of-alert" period. [...] [W]e wish to note that the factual circumstances of each case vary and, hence, a determination of whether the status of a member of a peace-keeping mission is on duty or off duty may depend in part on the particular factors of the case, taking into consideration the opinion of the Force Commander or Chief of Staff."[88]

While the "off-duty" conduct of a member of a national contingent would not be attributed to the organization,[89] the "on-duty" conduct may be so attributed, although one would have to consider how any ultra vires conduct relates to the functions entrusted to the person concerned.

56. The General Counsel of the International Monetary Fund wrote:

> "Attribution may apply even though the official exceeds the authority given to him, he failed to follow rules or he was negligent. However, acts of an official that were not performed in his official capacity would not be attributable to the organization."[90]

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[87] *I.C.J. Reports 1999*, p. 62 at p. 89 (para. 66).

[88] *United Nations Juridical Yearbook* (1986), p. 300.

[89] A clear case of an "off-duty" act of a member of UNIFIL, who had engaged in moving explosives to the territory of Israel, was considered by the District Court of Haifa in a judgement of 10 May 1979. *United Nations Juridical Yearbook* (1979), p. 205.

[90] Letter from the General Counsel of the International Monetary Fund, Mr. François Gianviti, dated 7 February 2003 addressed to the Secretary of the International Law Commission.

A similar concept, although differently worded, may be found in the judgement given by the Court of Justice of the European Communities in *Sayag v. Leduc*:

> "By referring at one and the same time to damage caused by the institutions and to that caused by the servants of the Community, article 188 [of the Treaty establishing the European Atomic Energy Community] indicates that the Community is only liable for those acts of its servants which, by virtue of an internal and direct relationship, are the necessary extension of the tasks entrusted to the institutions."[91]

57. Article 7 on State responsibility reads as follows:

> "The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."[92]

The key wording "in that capacity" refers to a relation that must exist between the ultra vires conduct and the functions entrusted to the organ, entity, person or official. The commentary makes this clearer by stating:

> "Cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State."[93]

Although the wording "in that capacity" is rather cryptic and vague,[94] it seems preferable to keep it. This would show that there is no need to elaborate for international organizations, under this respect, a different rule from that applying to a State.[95]

58. Some minor changes in the wording used in article 7 on State responsibility are, however, required. First of all, the term "elements of the governmental authority" is appropriate for States, but applies only in very limited cases to international organizations. The reference to organs, persons or entities could be

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[91] Judgment of 10 July 1969, Case 9/69, *European Court Reports* (1969), p. 329 at pp. 335-336 (recital 7). The Court noted that "[a] servant's use of his private car for transport during the performance of his duties does not satisfy the conditions set out above". Ibid., p. 336 (recital 9).

[92] See footnote 6 above.

[93] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr.1), chap. IV, sect. E.2, para. 7 of the commentary, p. 102.

[94] I. Brownlie, *System of the Law of Nations. State Responsibility. Part I* (Oxford: Clarendon Press, 1984), p. 147 noted that the Commission "formulates a principle in tautologous terms. Whilst wishing to avoid a basis for avoidance of responsibility, refuge is taken in imprecision". For examples of the variety of interpretations of the term "in that capacity" in this context, see L. Condorelli, "L'imputation à l'Etat d'un fait internationalement illicite: solutions classiques et nouvelles tendances", *Recueil des cours de l'Académie de Droit international de La Haye*, t. 189 (1984-VI), p. 9 at p. 94 and C. Fischer, *La responsabilité internationale de l'Etat pour les comportements* ultra vires *de ses organes* (Tolochenaz: Imprimerie Chabloz, 1993), pp. 234-235.

[95] Identity of solutions for States and international organizations was advocated by P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, op. cit. (18 above), p. 390; C. Pitschas, *Die völkerrechtliche Verantwortlichkeit der Europäischen Gemeinschaften und ihrer Mitgliedstaaten*, op. cit. (above, footnote 64), pp. 56 and 60; P. Daillier and A. Pellet, *Droit international public*, 7th ed. (Paris: Librairie générale de Droit et de Jurisprudence, 2002), p. 782.

aligned on the language used in draft article 4. The possessive "its" in the last line of article 7 is ambiguous and may be dropped.

59. The following wording is suggested:

> **"Article 6**
> **Excess of authority or contravention of instructions**
>
> "The conduct of an organ, an official or another person entrusted with part of the organization's functions shall be considered an act of the organization under international law if the organ, official or person acts in that capacity, even though the conduct exceeds authority or contravenes instructions."

VI. Conduct acknowledged and adopted by an international organization as its own

60. The relevance of acknowledgement and adoption of conduct after it has taken place may be viewed as reflecting a "principle [...] of agency or ratification".[96] It could also be viewed as the result of a procedural rule, relating to evidence. Whatever view one takes, it would seem unreasonable for the Commission to take a different approach from the one that led it to adopt article 11 on State responsibility.[97] Nor is there any reason for establishing for international organizations a different rule from the one which has been adopted with regard to States.

61. Moreover, there are a few recent examples of practice relating to acknowledgement or adoption on the part of international organizations. One is to some extent doubtful because it relates to adoption of responsibility rather than specifically to attribution of conduct.[98] In the oral pleadings before a WTO panel in the case *European Communities — Customs Classification of Certain Computer Equipment*, confronted with claims brought by the United States against Ireland and the United Kingdom, the European Community declared that it was

> "ready to assume the entire international responsibility for all measures in the area of tariff concessions, whether the measure complained about has been taken at the EC level or at the level of Member States."[99]

62. A clearer case is given by a decision of Trial Chamber II of the International Criminal Tribunal for the former Yugoslavia, which in *Prosecutor v. Dragan Nikolic* considered the question of the attribution to the Stabilization Force (SFOR) of the accused's arrest. The Chamber first noted that the ILC articles on State responsibility were "not binding on States". It then referred to article 57 and observed that the articles were "primarily directed at the responsibility of States and not at those of international organizations or entities".[100] However, the Chamber found that, "[p]urely as *general* legal guidance", it would "use the principles laid

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[96] Thus I. Brownlie, *System of the Law of Nations. State Responsibility. Part I*, op. cit. (see footnote 94 above), p. 158.

[97] See footnote 6 above.

[98] See comment, footnote 15 above.

[99] Unpublished document.

[100] "Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal", 9 October 2002, Case No. IT-94-2-PT, para. 60.

down in the draft articles insofar as they may be helpful for determining the issue at hand".[101] This led the Chamber to quote extensively article 11 and the related commentary.[102] The Chamber then added:

> "The Trial Chamber observes that both Parties use the same and similar criteria of 'acknowledgement', 'adoption', 'recognition', 'approval' and 'ratification', as used by the ILC. The question is therefore whether on the basis of the assumed facts SFOR can be considered to have 'acknowledged *and* adopted' the conduct undertaken by the individuals 'as its own'."[103]

The Chamber concluded that SFOR's conduct did not "amount to an 'adoption' or 'acknowledgement' of the illegal conduct 'as their own'".[104]

63. The text to be suggested may be perfectly parallel to article 11 on State responsibility. It would read as follows:

> **"Article 7**
> **Conduct acknowledged and adopted by an international organization as its own**
>
> "Conduct which is not attributable to an international organization under the preceding articles shall nevertheless be considered an act of that international organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own."

VII. Other cases of attribution of conduct to an international organization

64. The chapter on attribution of conduct in the articles on State responsibility[105] contains four other provisions which seem to be of limited interest with regard to international organizations. This suggests that one should refrain from writing parallel texts and leave open the possibility of an application by analogy of the rules established for States in the rare cases in which a problem of attribution that is covered by one of these articles may arise.

65. Article 5 on State responsibility concerns "Conduct of persons or entities exercising elements of governmental authority". As already noted, the term "governmental authority" cannot be appropriately used with regard to international organizations. Moreover, the definition suggested in draft article 4 as a general rule on attribution covers all cases in which a person is entrusted with part of the organization's functions. Insofar as entities are concerned, the General Counsel of IMF stated:

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[101] Ibid., para. 61.

[102] Ibid., paras. 62-63.

[103] Ibid., para. 64.

[104] Ibid., para. 106. The appeal was rejected on a different basis. On the point here at issue the Appeals Chamber only noted that "the exercise of jurisdiction should not be declined in case of abductions carried out by private individuals whose actions, unless instigated, acknowledged or condoned by a State or an international organization, or other entity, do not necessarily in themselves violate State sovereignty". Decision on interlocutory appeal concerning legality of arrest, 5 June 2003, Case No. IT-94-2-AR73, para. 26.

[105] See footnote 6 above.

> "[...] State responsibility rules on attribution that deal with acts of external entities are of limited, if any, relevance to international organizations. We know of no case in which the act of an external entity has been attributed to the IMF and, in our view, no act of an entity external to the IMF could be attributable to the IMF unless an appropriate organ of the IMF ratified or expressly assumed responsibility for that act."[106]

While this statement mainly relates to IMF, entities that are entrusted with some of the organizations' functions tend to be located inside the structure of the organization.

66. The wide definition in draft article 4 gives little scope for an additional rule modelled on article 8 on State responsibility ("Conduct directed or controlled by a State"). This is all the more so as the reference to practice in draft article 4 allows one to take into account situations of factual control, which characterize article 8 on State responsibility and may be harder to comprise in article 4 on State responsibility.

67. Article 9 ("Conduct carried out in the absence or default of the official authority") and article 10 ("Conduct of an insurrectional or other movement") on State responsibility presuppose control of territory. Despite a few recent developments, this is a rare event for an international organization. A parallel case to that envisaged for a State in article 10 — which would involve an insurrectional movement becoming a "new government" — would be particularly unlikely.

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[106] See footnote 90 above.